

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MICHAEL JONES,

Plaintiff,

v.

COUNTY OF CLARK; LAS VEGAS METRO
POLICE DEPARTMENT; and DOES 1 through
25, inclusive.

Defendants.

Case No. 2:13-cv-01002-RFB-VCF

ORDER

At a hearing on March 24, 2015 (“the Hearing”), the Court took under submission the matter of summary judgment regarding three of Plaintiff’s state law tort claims. ECF No. 35. As discussed below, the Court now grants summary judgment in favor of the Defendant on these remaining state law claims.

I. Factual Background

The matter before the Court involves Plaintiff Michael Jones's allegations against the Las Vegas Metropolitan Police Department (“Metro”), whom Jones alleges engaged in unlawful conduct against him on August 18, 2011.

On August 15, 2011, Jones traveled from Michigan to Las Vegas to visit his mother who was in the hospital. There was some discord between Jones and his sister, Jacqueline, that resulted in Jones reporting the matter to Metro. On August 18, Jones noticed that his mother's purse was missing from the dining room table and reported to Metro that he believed that his nephew, Denver, had stolen it. Jones’s nephew and sister subsequently called 911 and notified Metro that Jones had allegedly battered Denver. Paramedics arrived on the scene first, to treat Denver. Officers of

1 Metro arrived shortly thereafter to speak with Jones and Denver.

2 The police officers questioned Jones outside the front of his house. They searched and
3 patted Jones down for weapons, and Jones was asked to remain outside for some period of time
4 until Metro completed its investigation. The officers eventually left approximately an hour later
5 without charging anyone with a crime or arresting anyone. During this time, Jones was never
6 actually handcuffed.

7 Subsequently, Jones filed complaints with the Metro internal affairs bureau and later with
8 the Citizen Review Board.

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10 **II. Procedural History**

11 On June 6, 2013, Michael Jones filed a complaint with this Court against Defendants
12 County of Clark, Metro, and Does 1 through 25 on the basis of federal question jurisdiction.
13 Plaintiff claimed six causes of action, specifically 1) Violation of Civil Rights 42 U.S.C. § 1983:
14 Deprivation of Plaintiff's Rights, 2) Public Policy Tort, 3) Violation of N.R.S. 197.200 (oppression
15 under color of office), 4) Battery, 5) Assault, and 6) Negligence.

16 On June 26, 2013, Clark County moved to dismiss for failure to state a claim upon which
17 relief could be granted against Clark County. ECF No. 5. On January 13, 2014, the Court
18 dismissed Clark County as a Defendant, and a clerk's judgment was entered in favor of Clark
19 County and against Jones.

20 Meanwhile, on October 30, 2013, the Clerk's office filed an intent to dismiss the Las Vegas
21 Metro Police Department for failure to provide proof of service. ECF No. 10. On December 16,
22 the Court dismissed Metro without prejudice, pursuant to FRCP 4(m).

23 On January 27, 2014, Jones moved to reopen the case against Metro. ECF No. 15. On
24 March 17, 2014 the Court granted Jones's motion.

25 On March 27, 2014, Metro filed a motion for partial dismissal or in the alternative motion
26 for partial summary judgment. ECF No. 19.

27 On November 6, 2014, Metro filed the instant motion for summary judgment. ECF No.
28 29.

At the Hearing, the Court granted in part Metro's motion to dismiss, ECF No. 19, dismissing Jones's second claim (public policy tort) and third claim (oppression under color of office) with prejudice, but allowing the other four claims to survive. At the Hearing, the Court also granted in part Metro's motion for summary judgment, ECF No. 29, with regard to the section 1983 claim. The Court took the matter of summary judgment regarding the remaining three state law claims—Battery, Assault, and Negligence—under submission.

III. Legal Standard

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering the propriety of summary judgment, the court views all facts and draws all inferences in the light most favorable to the nonmoving party. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960 (9th Cir. 2011). If the movant has carried its burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation marks omitted).

IV. Motion for Summary Judgment, ECF No. 29

A. Finding of Undisputed Facts

On the record at the Hearing, the Court found certain facts, restated here below, to be undisputed, based on the parties' submissions.

On August 16, 2011, Jones called Metro regarding discord or threatening behavior from his sister, Jacqueline. On August 18, Jones called Metro to report that his nephew, Denver, had taken Jones's mother's purse from her house. Later on August 18, Jones called back to the Metro to report that Jacqueline was now at his mother's house causing a scene. Around the same time

1 that Jones was calling Metro, Jacqueline called 911 and reported that Jones had broken Denver's
2 glasses and pushed him out of the house. She also told the dispatcher that Jones was a convicted
3 felon who always appeared to be high and who served time in prison for shooting a firearm at
4 another person.

5 Prior to the arrival of Metro officers, paramedics came to the house. The paramedics did
6 not provide Jones with any information, and Jones remained in the house while the paramedics
7 met with or treated Denver. Metro officers arrived at the house approximately 15 to 30 minutes
8 after the paramedics had arrived. The officers interviewed Denver who alleged that Jones had
9 battered him. The officers then approached the door, tried to use a key to open the door, and when
10 this was not successful they knocked on the door. Jones let the officers inside the house briefly.
11 The officers asked Jones to step outside of the house they informed him that Denver claimed that
12 Jones had struck him. Jones denied that he had done so.

13 The officers asked Jones if they could do a search of his person for weapons. Jones agreed
14 and lifted his shirt so officers could see underneath it. When Jones turned around, one of the
15 officers grabbed his wrist and pulled it behind Jones's back. Jones let out a yell of pain and told
16 the officers that he had just had surgery on his wrist. The officers immediately let go of Jones's
17 hands. The officer had grabbed Jones's wrists only for a few seconds.

18 The officers had no further contact with Jones and never handcuffed him. The officers had
19 Jones remain outside of the house while they investigated the incident. This investigation lasted
20 approximately one hour. After approximately an hour, the officers left without arresting anyone.

21 Jones has not produced any records indicating any physical injuries nor has he identified
22 any witnesses confirming the existence of any injury. Jones has not provided any facts or evidence
23 beyond the incident itself to identify any policy or practice or training of Metro. Jones has not
24 provided any information about any supervisor or decision making official who participated in or
25 knew of or sanctioned the officers' conduct at the house.

26 **B. Discussion**

27 Having previously ruled on Metro's motion for summary judgment regarding the section
28 1983 claim, presently before the Court is only Metro's motion for summary judgment regarding

1 the torts of battery, assault, and negligence. ECF No. 29. Among other arguments, in its motion
 2 for summary judgment, id. at 26–27, and again at the Hearing, Metro raised the issue of
 3 discretionary-act immunity. In the context of the recent finding and holdings of this Court, the
 4 Court now holds that Jones’s three state law tort claims are barred by discretionary immunity.

5 **1. Nevada Discretionary-Act Immunity Law**

6 Under section Nevada Revised Statute section 41.032(2), discretionary-act immunity
 7 precludes an action against an immune contractor or an officer or employee of the State or any of
 8 its agencies or political subdivisions that is:

9 Based upon the exercise or performance or the failure to exercise or perform
 10 a discretionary function or duty on the part of the State or any of its agencies
 11 or political subdivisions or of any officer, employee or immune contractor
 12 of any of these, whether or not the discretion involved is abused.

13 Nev. Rev. Stat. § 41.032(2). In Martinez v. Maruszczak, 168 P.3d 720 (Nev. 2007), the Supreme
 14 Court of Nevada adopted the Berkovitz-Gaubert test to evaluate discretionary-act immunity under
 15 section 41.032. This two-part test originated with two U.S. Supreme Court decisions interpreting
 16 the Federal Tort Claims Act (FTCA), which mirrors section 41.032(2). See Berkovitz v. United
States, 486 U.S. 531 (1988); United States v. Gaubert, 499 U.S. 315 (1991).

17 Under this test, as adopted by the Supreme Court of Nevada, a governmental act or decision
 18 is entitled to discretionary-act immunity if it (1) “involve[s] an element of individual judgment or
 19 choice and (2) [is] based on considerations of social, economic, or political policy.” Martinez, 168
 20 P.3d at 729. This type of immunity may protect even “frequent or routine decisions” at all levels
 21 of government, provided they “require analysis of government policy concerns.” Id.

22 To clarify the standard, the Nevada Supreme Court stated that “immunity will likely attach
 23 under the second criterion” to actions that are integral to governmental planning or to the
 24 formulation of governmental policy, or if liability would disrupt the separation of powers or
 25 “jeopardize the quality of the governmental process.” Id. As an example, the Court distinguished
 26 between “the decision to create and operate a public hospital and . . . college of medicine,” which
 27 is entitled to discretionary-act immunity, and “a [state] physician’s diagnostic and treatment
 28 decisions,” which do not receive immunity as they “generally do not include policy
 considerations.” Id.

1 However, there are two limitations on discretionary-act immunity. First, immunity does
 2 not attach for actions taken in bad faith. Davis v. City of Las Vegas, 478 F.3d 1048, 1059 (9th
 3 Cir. 2007). “Bad faith . . . involves an implemented attitude that completely transcends the
 4 circumference of authority granted the individual or entity. In other words . . . an act or omission
 5 of bad faith occurs outside the circumference of authority. Stated otherwise . . . an act of bad faith
 6 has no relationship to a rightful prerogative even if the result is ostensibly within the actor's ambit
 7 of authority.” Falline v. GNLV Corp., 823 P.2d 888, 892 (1991). Second, acts that violate the
 8 Constitution cannot be viewed as discretionary. Nurse v. United States, 26 F.3d 996, 1002 (9th
 9 Cir. 2000).

10 **2. Assault and Battery**

11 Although Jones does not specifically allege a theory of *respondeat superior* in his claims
 12 for battery and assault, Compl. ¶¶ 64–77, ECF No. 1, it is apparent that Jones is not alleging that
 13 Metro as an entity assaulted or battered him, rather he is alleging that individual police officers in
 14 the employment, and under the control, of Metro engaged in assault and battery. However, the
 15 police officers who detained Jones whilst investigating Jacqueline’s and Denver’s allegations are
 16 entitled to discretionary-act immunity, and therefore no actionable assault or battery was
 17 committed.

18 “An officer's decision as to how to accomplish a particular seizure or search is generally
 19 considered a discretionary determination under Nevada law, and officers are therefore immune
 20 from suit as to state law claims arising therefrom in most cases.” Davis, 478 F.3d at 1059.
 21 Consequently, absent bad faith or unconstitutionality, discretionary-act immunity applies to the
 22 claims of assault and battery resulting from the search and seizure of Jones.

23 When granting summary judgment in favor of Metro regarding Jones’s section 1983 claim,
 24 this Court found the officers employed objectively reasonable force and held that there was no
 25 unlawful seizure and that Jones’s Constitutional rights were not violated. Furthermore, there is no
 26 evidence—disputed or undisputed—that demonstrates any police officers acted in bad faith. Thus,
 27 the officers’ behavior was neither unconstitutional nor attributable to bad faith, as defined within
 28 the context of section 41.032(2), and is subject to immunity pursuant to Nevada Revised Statute

1 section 41.032(2).

2 As the police officers were entitled to discretionary-act immunity, Jones's claims of assault
3 and battery against Metro cannot succeed.

4 **3. Negligence**

5 Jones' claim for negligence is also barred by discretionary-act immunity. Jones' claim for
6 negligence alleges that Metro "was under a legal obligation to regulate and supervise the officers
7 as well as reasonably investigate any claims or complaints of excessive force, unlawful detention
8 and unlawful search and seizures made with regards to the officers." Compl. ¶82, ECF No. 1.
9 This claim appears to allege negligence both as to supervision of employees and the investigation
10 of complaints against these same employees. The Court need not even reach the merits of whether
11 Plaintiff's claim can survive on the merits as the claim is barred by discretionary-act immunity.

12 The Ninth Circuit Court of Appeals has explained that discretionary-act immunity was
13 intended to apply to "decisions relating to the hiring, training, and supervision of employees."
14 Vickers v. United States, 228 F.3d 944, 950 (9th Cir. 2000); see also Martinez, 168 P.3d at 727–
15 29 (establishing that Nevada looks to federal decisional law for guidance on what type of conduct
16 discretionary-act immunity protects). Plaintiff's allegations in this case as to negligence also
17 involve the "hiring, training and supervision of employees," so this claim is barred by
18 discretionary-act immunity.

19 As with assault and battery, there is no evidence in the record establishing bad faith or a
20 constitutional violation. Thus, discretionary-act immunity attaches and Jones's negligence claim
21 is barred.

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Accordingly, Defendant Las Vegas Metropolitan Police Department's motion for summary judgment, ECF No. 29, is GRANTED, and Plaintiff Jones's third, fourth, and fifth claims are dismissed. As there are no remaining claims, the Clerk of Court is instructed to close this case.



 RICHARD F. BOULWARE, II
 UNITED STATES DISTRICT JUDGE